



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Department of Early Learning (DEL)

☒ Preproposal Statement of Inquiry was filed as WSR 06-22-020 ; or

☐ Expedited Rule Making--Proposed notice was filed as WSR _____; or

☐ Proposal is exempt under RCW 34.05.310(4).

☒ Original Notice

☐ Supplemental Notice to WSR _____

☐ Continuance of WSR _____

Title of rule and other identifying information: (Describe Subject)

Proposed New Chapter 170-06 WAC - DEL Background Check Rules; and

Related proposed amended and repealed sections of chapters:

- 170-151 WAC - School-age child care center minimum licensing requirements
- 170-295 WAC - Minimum licensing requirements for child care centers
- 170-296 WAC - Child care business regulations for family home child care

Hearing location(s):

1. Department of Early Learning Headquarters - Room 230
649 Woodland Square Loop (above Harborstone Credit Union)
Lacey, Washington 98503

Date: April 8, 2008

Time: 6:00 p.m.

2. Department of Early Learning - Yakima Office
1002 North 16th Ave
Yakima, Washington 98907

Date: April 12, 2008

Time: 4:30 p.m.

Submit written comments to:

Name: **DEL Rules Coordinator**

Address: **PO Box 40970, Olympia, WA 98504-0970**

e-mail **licensing.comments@del.wa.gov**

fax (360) 413-3482

by Noon on April 14, 2008

Assistance for persons with disabilities: Contact

DEL Rules Coordinator by April 4, 2008

TTY () _____ or (360) 725-4397

Date of intended adoption: Not earlier than April 15, 2008
(Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

The Department of Early Learning (DEL) is proposing new, amended and repealed rules establishing procedures for background checks conducted by DEL. DEL does a background check on every person authorized to provide care for or have unsupervised access to children in child care facilities licensed or certified by DEL.

Before July 3, 2006, background checks for child care were conducted under Department of Social and Health Services (DSHS) rules. When DEL was established as separate agency under chapter 265, Laws of 2006 (chapter 43.215 RCW), DSHS rules became obsolete for the purpose of conducting background checks for child care licensed or certified by DEL. DEL has been providing background checks since July 3, 2006 under emergency rules, and currently filed as WSR 08-04-060. The department intends to adopt the proposed background check rules as permanent to replace the emergency rules.

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The proposed rules also implement chapter 387, Laws of 2007 that further defined DEL's responsibility to conduct background checks under RCW 43.43.832. (Continued in Attachment A)

Reasons supporting proposal: See Attachment A.

Statutory authority for adoption: RCW 43.215.200; RCW 43.43.832(6)

Statute being implemented: Chap. 43.215 RCW; Chapter 265, Laws of 2006; Chapter 387, Laws of 2007

Is rule necessary because of a:

Federal Law?

Federal Court Decision?

State Court Decision?

If yes, CITATION:

☐ Yes ☒ No
☐ Yes ☒ No
☐ Yes ☒ No

CODE REVISER USE ONLY

CODE REVISER USE ONLY
STATE OF WASHINGTON
FILED

APR 15 2008

TIME 1055

08-06-101

DATE

3-5-08

NAME (type or print)

Jone M. Bosworth, JD

SIGNATURE

TITLE Director

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

Chapter 265, Laws of 2006 (codified as chapter 43.215 RCW) transferred the powers, duties, functions and rules pertaining to child care licensing from DSHS to the Department of Early Learning. As a result, references to DSHS-related laws, rules and programs in the child care licensing WAC chapters 170-151, 170-295, and 170-296 became obsolete. Several of these obsolete references are corrected in this proposal, along with other minor corrections and clarifications that do not change the intended effect of the rules.

Name of proponent: (person or organization)

Department of Early Learning

☐ Private
☐ Public
☒ Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Marge Johnson, Policy Analyst	DEL, PO Box 40970, Olympia, WA 98504-0970	(360) 725-4683
Implementation..... Amie Lapp Payne, Dep. Director	DEL, PO Box 40970, Olympia, WA 98504-0970	(360) 725-4932
Enforcement..... Amie Lapp Payne, Dep. Director	DEL, PO Box 40970, Olympia, WA 98504-0970	(360) 725-4932

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

☐ Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone () _____

fax () _____

e-mail _____

☒ No. Explain why no statement was prepared.

A small business economic impact statement was not prepared. The department has determined that new costs, if any, to small business required to comply with the proposed rules would minor.

Is a cost-benefit analysis required under RCW 34.05.328?

☐ Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name:

Address:

phone () _____

fax () _____

e-mail _____

☒ No: Please explain:

A cost-benefit analysis was not prepared. The Department of Early Learning is not listed in RCW 34.05.328(5)(a)(i) among the agencies to which the requirements of RCW 34.05.328 apply.

**Attachment A to
CR-102 Proposed Rule Making Notice
Chapter 170-06 WAC – DEL Background Check Rules**

Purpose of the proposal (continued from the CR-102 proposed rule making notice)

DEL authority to conduct background checks

The Department of Early Learning is required by law to assess the character, suitability and competence of anyone applying for a child care license or to care for children in child care, and others who would have unsupervised access to children in child care. DEL is also required by law to adopt its background check requirements by rule (WAC). DEL's responsibilities are described in the following sections of chapters 43.215 and 43.43 RCW, quoted in part:

RCW 43.215.200

It shall be the [DEL] director's duty with regard to licensing:

...(2) In consultation and with the advice and assistance of parents or guardians, and persons representative of the various type agencies to be licensed, to adopt and publish minimum requirements as for licensing applicable to each of the various categories of agencies to be licensed under this chapter;

(3) In consultation with law enforcement personnel, the director shall investigate the conviction record or pending charges of each agency and its staff seeking licensure or relicensure, and other persons having unsupervised access to children in care...

[DEL Note: 'requirement' is defined in RCW 43.215.010 (9) as "any rule, regulation, or standard of care to be maintained by an agency"]

RCW 43.215.205

Applications for licensure shall require, at a minimum, the following information:

...(2) The character, suitability, and competence of an agency and other persons associated with an agency directly responsible for the care of children;

RCW 43.215.215

(1) In determining whether an individual is of appropriate character, suitability, and competence to provide child care and early learning services to children, the department may consider the history of past involvement of child protective services or law enforcement agencies with the individual for the

purpose of establishing a pattern of conduct, behavior, or inaction with regard to the health, safety, or welfare of a child. No report of child abuse or neglect that has been destroyed or expunged under RCW 26.44.031 may be used for such purposes. No unfounded or inconclusive allegation of child abuse or neglect as defined in RCW 26.44.020 may be disclosed to a provider licensed under this chapter.

(2) In order to determine the suitability of applicants for an agency license, licensees, their employees, and other persons who have unsupervised access to children in care, and who have not resided in the state of Washington during the three-year period before being authorized to care for children, shall be fingerprinted.

...(c) The director shall use the information solely for the purpose of determining eligibility for a license and for determining the character, suitability, and competence of those persons or agencies, excluding parents, not required to be licensed who are authorized to care for children.

RCW 43.43.832

....(6) The director of the department of early learning shall adopt rules and investigate conviction records, pending charges, and other information including civil adjudication proceeding records, in the following circumstances:
[DEL Note: See the definition of "civil adjudication proceeding in RCW 43.43.830]

(a) When licensing or certifying agencies with individuals in positions that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood education services, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(b) When authorizing individuals who will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services in licensed or certified agencies, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older;

(c) When contracting with any business or organization for activities that will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services;

(d) When establishing the eligibility criteria for individual providers to

receive state paid subsidies to provide child day care or early learning services that will or may involve unsupervised access to children.

RCW 43.43.830

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW 43.43.830 through 43.43.845....

(3) "Civil adjudication proceeding" is a judicial or administrative adjudicative proceeding that results in a finding of, or upholds an agency finding of, domestic violence, abuse, sexual abuse, neglect, abandonment, violation of a professional licensing standard regarding a child or vulnerable adult, or exploitation or financial exploitation of a child or vulnerable adult under any provision of law, including but not limited to chapter 13.34, 26.44, or 74.34 RCW, or rules adopted under chapters 18.51 and 74.42 RCW. "Civil adjudication proceeding" also includes judicial or administrative findings that become final due to the failure of the alleged perpetrator to timely exercise a legal right to administratively challenge such findings.

(4) "Conviction record" means "conviction record" information as defined in RCW 10.97.030 and 10.97.050 relating to a crime committed by either an adult or a juvenile. It does not include a conviction for an offense that has been the subject of an expungement, pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, or a conviction that has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. It does include convictions for offenses for which the defendant received a deferred or suspended sentence, unless the record has been expunged according to law.

(5) "Crime against children or other persons" means a conviction of any of the following offenses: Aggravated murder; first or second degree murder; first or second degree kidnaping; first, second, or third degree assault; first, second, or third degree assault of a child; first, second, or third degree rape; first, second, or third degree rape of a child; first or second degree robbery; first degree arson; first degree burglary; first or second degree manslaughter; first or second degree extortion; indecent liberties; incest; vehicular homicide; first degree promoting prostitution; communication with a minor; unlawful imprisonment; simple assault; sexual exploitation of minors; first or second degree criminal mistreatment; endangerment with a controlled substance; child abuse or neglect as defined in RCW 26.44.020; first or second degree custodial interference; first or second degree custodial sexual misconduct; malicious harassment; first, second, or third degree child molestation; first or second degree sexual misconduct with a minor; *patronizing a juvenile prostitute; child abandonment; promoting pornography; selling or distributing erotic material to a minor; custodial assault; violation of child abuse

restraining order; child buying or selling; prostitution; felony indecent exposure; criminal abandonment; or any of these crimes as they may be renamed in the future.

DEL Public Input Process

These proposed rules were developed following:

- Forums held statewide in November and December 2006 seeking public input on the emergency background check rules (still in effect) and previous background check rules of the DSHS that were in effect for licensed and certified child care prior to the formation of DEL in 2006.
- Meetings in summer 2007 with child care providers, parent advocates, and the Services Employees International Union.
- Public review and comment on a preliminary draft of the background check rules in February 2008.

Further information about this proposal is available at the DEL public website, <http://www.del.wa.gov/policy/policyRules.shtml>, or by contacting the DEL Rules Coordinator to obtain information about these proposed rules by postal mail.

The public will also have further opportunities to comment on this proposal by either submitting written comments to the e-mail, fax and postal addresses noted on in this proposal or by attending one of two public hearings, scheduled for April 8, 2008, in Lacey and April 12, 2008, in Yakima.

Comments on this proposal will be accepted until noon on Monday, April 14, 2008. Public comments, and the department's response to each issue raised in comments, will be summarized in a "concise explanatory statement" prepared under RCW 34.05.325. The concise explanatory statement will be sent to everyone who comments on this proposal and to anyone who requests it.

Related changes to Child Care Licensing WAC chapters

Accompanying amendments to the Child Care Licensing WAC chapters 170-151, 170-295, and 170-296 make background check requirements and procedures more consistent for all child care licensed and certified by DEL, and make those rules consistent with proposed new chapter 170-06 WAC. A side-by-side comparison of the proposed WAC chapter 170-06 and changes to the Child Care Licensing rules is available online at <http://www.del.wa.gov/Policy/policyPubComment.shtml> or by contacting the DEL Rules Coordinator at 360-725-4397, or at e-mail andres.fernando@del.wa.gov.

Summary of Key Comments on the Preliminary Draft of Background Check Rules Received from 2-11-08 through 2-22-08

The Department circulated a preliminary draft of chapter 170-06 WAC on February 11, 2008 for public review. The following represent some key issues raised in those comments. The actual comments on the preliminary draft rules are available on the DEL public website

http://www.del.wa.gov/Policy/Comments/Draft_Background_Check_rules_email_comments_2-11-08_to_2-25-08_v2.pdf.

1. Rule-making process

Concerns were expressed that the timeframes for comment on the informal draft were too short and that public comments were not posted for viewing.

The department is committed to an open and transparent rule-making process. The public and key stakeholders have had other opportunities to participate in the development of these rules in 2006, 2007 and in February 2008, and they may still comment on this proposal before the final rules are adopted.

While DEL does not presently have the technological capacity to post public comments online immediately upon submission, we are exploring this possibility for future public comment periods. The department made all comments on the draft rules available on the DEL website within one business day after the comment deadline.

Note: The law does not require actual posting of comments for public view during or after the rulemaking process. RCW 34.05.325 requires DEL to summarize and respond to the comments in a "concise explanatory statement" prepared just before adopting the final rule. However, to ensure an open rulemaking process, DEL will post comments on this proposal online weekly during the public comment period.

2. Negative actions and other non-conviction background information:

Concerns were expressed that this is a new requirement, about whether DEL has the authority to make decisions based on information other than criminal convictions, what criteria is used for these decisions and that a person could be disqualified based on something as minor as a traffic ticket.

In RCW 43.43.832 (6), DEL is directed to investigate conviction records, pending charges, and other information including *civil adjudication proceeding records*, when licensing or certifying agencies and when authorizing individuals who will or may have unsupervised access to children who are in child day care. Civil adjudication proceedings may include a variety of judicial, administrative, or other agency findings. RCW 43.43.832 (1) states that businesses and organizations

providing services to children need adequate information to determine which employees or licensees to hire or engage.

Currently, the "DEL Director's List of Crimes and Negative Actions" (also known as the "Secretary's List of Crimes") is adopted by reference in the Child Care Center and Family Home Child Care WAC chapters 170-295 and 170-296 WAC, and in the emergency Background Check WAC chapter 170-06, but the content of the "List" has not been in the WAC. All of the "negative actions" defined in WAC 170-06-0020(9) and referenced throughout chapter 170-06 WAC are the same the negative actions in the DEL Director's List of Crimes and Negative Actions reference in the current child care licensing rules.

The current DEL Director's List of Crimes and Negative Actions is available online at:

http://www.del.wa.gov/pdf/ccel/del_directors_list_of_disqualifying_crimes.pdf.

The Director's List is essentially unchanged from the time DEL was formed in 2006. It also is essentially the same as the DSHS Secretary's List of Disqualifying Crimes that was in effect for licensed and certified child care before DEL was formed.

In proposed WAC chapter 170-06:

- The Director's List is in proposed in its entirety, with the exception that "theft-welfare" is added. Crimes on the Director's List are described in WAC 170-06-0120 and reflect only crimes. The current Director's List online mixes crimes and non-crime negative actions and is much less clear.
- Negative actions are more clearly defined in WAC 170-06-0020(9).
- The Department's actions that can or will be taken based on consideration of negative actions and other information about an applicant is more detailed in the proposal.
- Negative actions that always disqualify a person have been limited to those actions that relate to abuse or neglect of a child and those that relate to abuse, neglect or financial exploitation of a vulnerable adult.
- Other negative actions or information that are considered for disqualification must be *reasonably related to a persons' ability to care for or have unsupervised access the children in child care*. To disqualify an applicant, DEL must demonstrate that the information or negative action is related.

3. Background check process:

Concerns were expressed about the lack of established timelines in the rules for getting background check authorizations back from DEL, delays in the fingerprinting process. Some commenters were concerned that a person must

have a DEL background check when they already have or had a background check from a school, military or other employer.

Besides DEL, there are three other agencies involved in the background check process: The Department and Social and Health Services-Background Check Unit, Washington State Patrol, and the FBI. Federal and state background check laws have been in near constant change recently, and so procedures have also been changing. DEL is reviewing its background check processing steps with the intent of proposing improvements in the approximately 30,000 background checks the department processes each year. Some of these improvements may require legislative funding or approval, and so may occur in future years. In the meantime, it may not be appropriate to state a particular deadline in rule for DEL to complete a background check or determination that an applicant is or is not qualified, if the alternative would be to allow applicants to provide unsupervised child care who may later be determined as unqualified under these rules. The duty to protect the health and safety of children in child care must be the Department's first concern.

Regarding duplicate background checks of schools, military or other employers, state law requires that a background check done for one purpose or agency may not be used for another purpose. Background checks used for military jobs or even for employment in other licensed facilities – such as long-term care or hospitals – may not include and consider the same set of crimes and negative actions as required for child care licensed or certified by DEL.

4. Character, suitability, competence assessment:

Concerns were expressed about DEL's legal authority to assess character, competence and suitability, what criteria will be used and that it is ambiguous. Also, DEL's authority to require additional information from an applicant was questioned.

In RCW 43.215.205 and 42.215.215, DEL is directed to collect information on the character, suitability and competence of applicants for licensure and for other persons associated with an agency. RCW 43.43.832 (6) defines who must be investigated for authorization to care for or have unsupervised access to children in child care.

Currently, DEL licensing staff conduct this assessment based on information disclosed on the background check form, Washington State Patrol records, adjudicative proceeding records from other agencies (such as DSHS, Department of Health, Department of Corrections, and FBI records when required) and other information that comes to the attention of DEL during the license application or background check process.

In proposed WAC chapter 170-06:

- The sources for information to conduct the assessment are unchanged from current requirements and are essentially unchanged from requirements in effect when DSHS licensed child care.
- WAC 170-06-0030 states the reason for background check evaluations.
- WAC 170-06-0050 states the steps that DEL must take to assess the character, suitability and competence of the background check applicant.
- The proposed rules are more specific regarding how negative actions and other types of actions are considered by the Department.
- In WAC 170-06-0060, DEL will have to have 'reason to believe that additional information is needed' before requesting an applicant to provide more information or evaluative reports.

Other Questions and Answers

Who has appeal rights under these rules? Any individual who is disqualified by DEL has the right to appeal the disqualification. These rights are more clearly described in the proposed background check rules. The current school age child care and child care center rules do not state an applicant's hearing rights. The family home child care rules have only a brief sentence describing an applicants hearing rights.

Can an applicant who has been disqualified by DEL have the opportunity to show that they do not pose a risk to children? Yes, if the applicant can demonstrate to DEL by clear and convincing evidence that they have the character, suitability and competence to care for or have unsupervised access to children in child care, DEL may consider authorizing them.

Reasons why rules are needed on this subject:

DEL is required by law to adopt rules setting the minimum requirements for licensed and certified child care, and rules for conducting background checks on persons applying to be authorized to care for children in child care or to have unsupervised access to children in child care.

The proposed rules help DEL, parents, and child care providers protect the health and safety of children by requiring that all persons applying to be authorized to care for children in child care or to have unsupervised access to children in child care have completed a background check inquiry.